2014

Legal Information, the Consumer Law Market, and the First Amendment

Renee Newman Knake
Michigan State University College of Law, rk@law.msu.edu

LEGAL INFORMATION, THE CONSUMER LAW MARKET, AND THE FIRST AMENDMENT

*Renee Newman Knake**

"[L]aw is basically information."[1]

"[T]he creation and dissemination of information are speech within the meaning of the First Amendment."[2]

INTRODUCTION

If "law is basically information,"[3] does it follow that legal information is "speech within the meaning of the First Amendment"?[4] If so, to what extent may government constitutionally regulate the creation and dissemination of legal information, particularly by lawyers? The answers to these questions hold significant implications for lawyer regulation, the consumer law market, and First Amendment jurisprudence.

The consumer law market—i.e., those individuals who do not qualify for legal aid and are unwilling or unable to pay for an attorney who charges three figures per hour for multiple hours—has long been denied affordable, accessible, widely adopted legal services. According to some estimates, this is as much as 80 percent or more of the American population.[5] Every

* Associate Professor of Law and Co-Director, Kelley Institute of Ethics and the Legal Profession, Michigan State University College of Law; J.D., University of Chicago School of Law. Thank you to George Mason University School of Law's Law and Economics Center for inviting me to present an early draft of this Article at the *Research Roundtable on Law's Information Revolution* as well as to the participants for their useful feedback. I am grateful to Ben Barton, David Blankfein-Tabachnick, Bruce Green, John McGinnis, Russ Pearce, Deborah Rhode, Cassandra Burke Robertson, R. Amani Smathers, and Laurel Terry for helpful conversation and comments, as well as to Barbara Bean for research assistance. This Article benefited from comments received during faculty workshops at American University, Michigan State University, and the University of Arizona.

1. Larry Ribstein, *New Yorker Captions and the Law*, TRUTH ON MARKET (Sept. 10, 2011), http://truthonthemarket.com/2011/09/10/new-yorker-captions-and-the-law/.

2. Sorrell v. IMS Health, Inc., 131 S. Ct. 2653, 2667 (2011).

3. Ribstein, *supra* note 1.

4. *Sorrell*, 131 S. Ct. at 2667.

5. *See* COMM. ON EQUAL ACCESS TO LEGAL SERVS., REPORT ON INVESTIGATION OF NEED AND ASSESSMENT OF RESOURCES 7 (2001), *available at* http://www.nlada.org/DMS/Documents/1003937509.62/VT%20FINALRPT.pdf (reporting that a survey of low-income Vermonters demonstrated that only nine percent of respondents with legal problems received legal help); D. MICHAEL DALE, LEGAL NEEDS OF LOW INCOME HOUSEHOLDS IN MONTANA 12 (2005), *available at* http://www.nlada.org/DMS/Documents/1149970443.85/MT%20LNS%20Full_Report.pdf (concluding that, overwhelmingly, households in Montana with legal problems do not resolve them with a lawyer's assistance); SUPREME COURT OF GA.

decade going back to Karl Llewllyn's call in the 1930s for lawyers to "find the customer who does not know he wants it and mak[e] him want it,"[6] members of the profession have bemoaned the plight of the average American who likely does not even recognize that he has a legal problem, let alone the financial or informational resources to secure legal assistance. Yet, no comprehensive reform has occurred over the years to improve the conditions of the consumer law market.

At the same time, information has become increasingly available more cheaply than ever before.[7] Technology is enhancing our capacity to gain meaning from vast quantities of data in a range of domains from medicine to national security.[8] Even the legal industry itself is in the midst of what has been called "law's information revolution," a label for "the growth of new markets for law-related information and advice. . . . [A] legal information industry in which legal information factories replace the sole proprietors and worker cooperatives that traditionally have delivered legal services."[9] Nevertheless the consumer law market lags behind other industries in access to user-friendly, customer-driven information.[10] In this Article, I posit that one reason for this is the way lawyers are regulated, and I examine whether the First Amendment might offer constitutional grounds for liberalizing lawyer professional conduct rules to enhance access to legal information.

In *Sorrell v. IMS Health, Inc.*, a recent U.S. Supreme Court decision involving pharmaceutical data, Justice Anthony Kennedy, writing for the six-to-three majority, declared that "the creation and dissemination of

---

EQUAL JUSTICE COMM'N, CIVIL LEGAL NEEDS OF LOW AND MODERATE INCOME HOUSEHOLDS IN GEORGIA: A REPORT DRAWN FROM THE 2007/2008 GEORGIA LEGAL NEEDS STUDY 27 (2009), *available at* http://www.georgiacourts.org/files/legalneeds_report_2010%20final%20with%20addendum.pdf (finding that over 80 percent of households in Georgia did not seek legal help when facing legal issues); DEBORAH RHODE, ACCESS TO JUSTICE 3 (2004) ("According to most estimates, about four-fifths of the civil legal needs of the poor, and two- to three-fifths of the needs of middle-income individuals, remain unmet.").

6. K. N. Llewellyn, *The Bar's Troubles, and Poultices—and Cures?*, 5 L. & CONTEMP. PROBS. 104, 115 (1938) ("[S]pecialized work, mass-production, cheapened production, advertising and *selling*—finding the customer who does not know he wants it, and *making* him want it: these are the characteristics of the age. Not, yet, of the Bar.").

7. *See, e.g.*, Lucas Mearian, *By 2020 There Will Be 5,200 GB of Data for Every Person on Earth*, COMPUTERWORLD (Dec. 11, 2012, 5:29 AM), http://www.computerworld.com/s/article/9234563/By_2020_there_will_be_5_200_GB_of_data_for_every_person_on_Earth?pageNumber=1 ("During the next eight years, the amount of digital data produced will exceed 40 zettabytes . . . estimated to be 57 times the amount of all the grains of sand on all the beaches on earth.").

8. *See, e.g.*, Steve Lohr, *Sizing Up Big Data*, N.Y. TIMES, June 20, 2013, at F1.

9. Bruce Kobayashi & Larry E. Ribstein, *Law's Information Revolution*, 53 ARIZ. L. REV. 1169, 1171–72 (2011).

10. Travel, medicine, retail, and other personal services industries have experienced wide-scale expansion and democratization from the free flow of information via the internet over the past two decades, but this is not yet the case for legal services, though recent investment into legal start up businesses offers promise for the consumer law market. *See, e.g.*, Joshua Kubicki, *2013 Was a Big Year for Legal Startups; 2014 Could Be Bigger*, TECH COCKTAIL (Feb. 14, 2014), http://tech.co/2013-big-year-legal-startups-2014-bigger-2014-02 ("Roughly $458 million was invested into legal startups in the last year by investors. This is a remarkable increase from the $66 million invested in 2012.").

information are speech within the meaning of the First Amendment."[11] This raises new questions for regulators and courts about the First Amendment and legal information produced by lawyers, especially in the context of the consumer law market. Should rules that compromise the free flow of legal information be subject to a heightened review comparable to strict scrutiny, the intermediate scrutiny of commercial speech, some other sort of review, or not be treated as speech at all? This answer turns on the production and dissemination of the speech as much as the content of the speech itself.

This Article is the first to evaluate the impact of *Sorrell* on lawyers' monopoly over certain forms of legal information and in First Amendment jurisprudence as it relates to lawyer speech more broadly.[12] Contra regulators of the legal profession and those who believe such information ought not be fully protected,[13] I argue that the creation and dissemination of legal information by lawyers[14] warrant heightened protection in certain instances, a conclusion with significant consequences for a number of lawyer professional conduct rules addressing advertising/solicitation, ownership, multidisciplinary practice, geographic practice restrictions, and unauthorized practice of law.

The Article proceeds as follows. Part I endeavors to define what constitutes legal information and to identify ways in which the free flow of this information from lawyers is constrained by professional discipline rules and other regulations. Part II analyzes the current level of First Amendment coverage and protection for legal information produced by lawyers. I explain why legal information created and disseminated by lawyers is covered by the First Amendment and then turn to the more nuanced and complex question of the protection warranted. Here I propose a normative framework drawn from an information-driven and competence-focused understanding of the First Amendment for resolving tensions between the competing goals of free-flowing public knowledge and reliable disciplinary expertise. Part III identifies existing professional conduct regulations vulnerable to challenge as unconstitutionally infringing upon the creation

11. Sorrell v. IMS Health, Inc., 131 S. Ct. 2653, 2667 (2011).

12. For a detailed overview of First Amendment jurisprudence in the context of lawyer regulation, see W. Bradley Wendel, *Free Speech for Lawyers*, 28 HASTINGS CONST. L.Q. 305 (2001).

13. *See, e.g.*, Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 781 (1976) (Rehnquist, J., dissenting); CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 123, 127 (1993) (suggesting that nonpolitical speech like advertising receive reduced First Amendment protection); C. Edwin Baker, *Commercial Speech: A Problem in the Theory of Freedom*, 62 IOWA L. REV. 1, 3 (1976) ("[T]he existing form of social and economic relationships in the United States [requires] a complete denial of first amendment protection for commercial speech."); *cf.* Rodney A. Smolla, *Information, Imagery, and the First Amendment: A Case for Expansive Protection of Commercial Speech*, 71 TEX. L. REV. 777, 780 (1993) ("Commercial speech, as speech, should presumptively enter the debate with full First Amendment protection.").

14. My focus here is government regulation of lawyers' creation and dissemination of legal information. To be sure, nonlawyers can and do create and disseminate legal information—the First Amendment's application to this sort of information raises interesting questions worthy of attention but beyond the scope of this Article.

and dissemination of legal information, including the ban on nonlawyer ownership/investment, geographic licensing restrictions, limitations on advertising and solicitation, and unauthorized practice of law statutes. Based upon the First Amendment doctrine and economic theory—which lends further support to the constitutional justifications for liberalizing lawyer regulation to facilitate the free flow of legal information—the Article concludes by identifying a number of lawyer conduct rules in need of reform to address the problematic lack of legal information available to and accessed by the consumer law market.

I. WHAT IS LEGAL INFORMATION?

What constitutes legal information? A precise definition is difficult to provide, especially given that new forms of information are continually expanding via increasingly sophisticated data production and artificial intelligence developments.[15] Others have identified three broad categories of legal information.[16] The first is documents or products sold to users, including "contracts, software for rendering automated legal advice, and legal codes."[17] Under this label I would add nonautomated but standardized[18] legal material that is otherwise commoditizable and scalable in a mass-delivery setting, as well as lawyer blogs and other print and electronic resources that provide information about law.[19] "Legal ideas" comprise the second category, for example the "'poison pill' takeover defense in corporate law" or "legal methods including jury selection, insuring against professional liability claims, and tax-avoidance."[20] The third category is what might be classified as legal financials: legal information "used to make money in capital markets . . . [where] sellers are not creating a product or document but rather hope to use legal information by trading securities."[21] Legal information may come from lawyers and, importantly, nonlawyers alike. For purposes here, my focus is on legal information that is created and disseminated by lawyers.

A number of professional conduct regulations impede the free flow of legal information from lawyers. Some of these are *professional competence rules*, defining the essence of what it means to practice law, i.e., unique

15. *See generally* Daniel Martin Katz, *Quantitative Legal Prediction—or—How I Learned To Stop Worrying and Start Preparing for the Data-Driven Future of the Legal Services Industry*, 62 EMORY L.J. 909 (2013).

16. *See* Kobayashi & Ribstein, *supra* note 9, at 1174.

17. *Id.*

18. Geoff Hazard, Russ Pearce, and Jeff Stempel make the distinction between "individualized" and "standardizable" advice, which "depends primarily on the degree of risk that the particular legal problem poses for the client. . . . [where] risk is a function of (1) the gravity of the consequences to life, liberty, or property that might ensue if the legal service does not favorably resolve the matter in question, and (2) the probability that one or more of these consequences will actually occur." Geoffrey C. Hazard, Jr., Russell G. Pearce & Jeffrey W. Stempel, *Why Lawyers Should Be Allowed To Advertise: A Market Analysis of Legal Services*, 58 N.Y.U. L. REV. 1084, 1091 (1983). Standardizable advice would fall under my definition of what constitutes legal information.

19. *See* discussion *infra* Part II.A.

20. Kobayashi & Ribstein, *supra* note 9, at 1174, 1180.

21. *Id.*

legal analysis and advice tailored to a specific set of facts, attorney-client confidentiality, and avoidance of conflicts of interest. These sorts of regulations on lawyer speech are necessary to promote and preserve "democratic competence" and "disciplinary knowledge,"[22] i.e., regulation that enables members of the legal profession to provide the specialized legal analysis and advice that their clients can trust and rely upon.

Other regulations cover the organizational structure of law practice and the distribution of legal services. These organization and distribution rules have less to do with the essence of lawyering and are more aptly described as bearing on the economics of law practice. These include the ban on nonlawyer ownership or investment in law firms, the ban on multidisciplinary partnerships, geographic practice restrictions, limits on advertising and solicitation, and some elements of unauthorized practice of law statutes.

Lawyer regulators historically have treated the professional competence rules and the organization/distribution rules as identical in terms of how their constraint of speech operates under the First Amendment. Regulators (in contrast with the Supreme Court) have not prioritized the value of legal information to the consumer law market. Until the 1960s and 1970s, the dominant view was that legal information is not speech or, to the extent that it may be, that the First Amendment does not protect legal information from regulation governing the organizational form for production or distribution.

This perspective began to evolve as lawyers, faced with constraints on their ability to provide legal information to unserved or underserved markets, found success in liberalizing professional regulations via First Amendment challenges. In 1963, the Supreme Court decided *NAACP v. Button*,[23] the first of these challenges. There, the Court held that the Virginia State Bar could not ban civil rights lawyers from informing individuals about their constitutional rights. Over a decade later, in *Bates v. State Bar*, the Court extended its then emerging commercial speech doctrine to protect the dissemination of legal information about attorney fees posted in a newspaper in the late 1970s.[24] In the wake of *Bates*, the Court took up a number of lawyer speech restrictions, sometimes siding with the regulators to uphold speech restrictions[25] and frequently not,[26] mostly in the

22. *See* ROBERT C. POST, DEMOCRACY, EXPERTISE, ACADEMIC FREEDOM: A FIRST AMENDMENT JURISPRUDENCE FOR THE MODERN STATE 96 (2012).

23. 371 U.S. 415 (1963).

24. Bates v. State Bar, 433 U.S. 350 (1977).

25. *See, e.g.*, Milavetz, Gallop & Milavetz, P.A. v. United States, 130 S. Ct. 1324 (2010) (holding that a state may mandate an advertising disclosure for lawyers providing bankruptcy-related services); Fla. Bar v. Went For It, Inc., 515 U.S. 618, 620 (1995) (holding that a thirty-day prohibition on direct-mail solicitation by lawyers of personal injury or wrongful death clients withstood First Amendment scrutiny); Zauderer v. Office of Disciplinary Counsel, 471 U.S 626, 655 (1985) (holding that disciplinary rules could mandate disclosure regarding payment of costs in advertisement, but that First Amendment protected attorneys so long as advertisement was truthful and nondeceptive); Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 449 (1978) (upholding a ban on in-person solicitation of personal injury victims).

26. *See, e.g.*, Republican Party of Minn. v. White, 536 U.S. 765, 788 (2002) (applying strict scrutiny to hold that a rule prohibiting attorneys and judges running for judicial office

context of advertising, client solicitation, and advice giving. In each of these cases, the Court has focused heavily on the public's informational interest. Lawyer regulators, however, as well as most First Amendment theorists, have failed to fully appreciate the free speech value of legal information to the public, especially the consumer law market.

While the public's right to receive information has long been a central concern for the Supreme Court, especially in the context of legal services, as well as consumer goods and other professional services,[27] by contrast, the legal profession adheres to regulations that severely limit legal information from lawyers made available to the public. The Court has used the public's informational interest as justification to strike down numerous regulations banning truthful information from reaching the consumer market, starting in the mid-1970s with abortion procedures,[28] prescription drugs,[29] and legal services,[30] followed by an array of other kinds of information ranging from utility promotions[31] to commercial handbills[32] to liquor prices.[33] At the same time, lawyer regulators have refused to liberalize professional conduct rules in ways that could benefit the consumer law market.[34] It has been nearly fifty years since the Court took its proconsumer stance in *Bates*; the recent decision in *Sorrell* offers

---

from speaking their views on legal or political issues violated the First Amendment); Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 547–49 (2001) (applying heightened scrutiny to hold that a federal statute prohibiting Legal Service Corporation attorneys from challenging the validity of welfare laws violated the First Amendment); *Zauderer*, 471 U.S. at 642–43 (holding that restrictions on attorney advertising and solicitation violated the First Amendment); *In re* R.M.J., 455 U.S. 191, 206 (1982) (same); *In re* Primus, 436 U.S. 412, 437–40 (1978) (same); *Bates*, 433 U.S. at 384 (same); *Button*, 371 U.S. at 437 (applying strict scrutiny to hold that rule prohibiting the NAACP from advising and assisting potential litigants to bring desegregation suits violates the First Amendment).

27. *See* Bigelow v. Virginia, 421 U.S. 809, 822 (1975) ("The advertisement . . . did more than simply propose a commercial transaction. It contained factual material of clear 'public interest.'"). As Justice Blackmun explained in his written preargument memorandum for a later case, "The emphasis in *Bigelow* was on the public and its right to receive information." LINDA GREENHOUSE, BECOMING JUSTICE BLACKMUN: HARRY BLACKMUN'S SUPREME COURT JOURNEY 119 (2006); *see also* Ronald K.L. Collins & David M. Skover, *Commerce & Communication*, 71 TEX. L. REV. 697, 730 (1993) ("The 'informational function' is central to the Court's approval of commercial expression as a form of protected speech."). Collins and Skover state that "of the major commercial speech cases in which governmental regulation has been invalidated, nearly all 'involved restrictions on either purely or predominantly informational speech, such as the bans on price advertising.' By comparison, governmental regulations were sustained in cases not involving 'predominantly informational advertising.'" *Id.* (quoting David Hays Lowenstein, *"Too Much Puff": Persuasion, Paternalism and Commercial Speech*, 56 U. CIN. L. REV. 1205, 1229 (1988)).

28. *Bigelow*, 421 U.S. at 825–26.

29. Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748 (1976).

30. *See* Shapero v. Ky. Bar Ass'n, 486 U.S. 466, 472 (1988) (holding that a categorical ban on direct-mail solicitation targeting potential clients with specific legal claims violated the First Amendment); Bates v. State Bar, 433 U.S. 350, 384 (1977) (holding that categorical ban on lawyer advertising violated the First Amendment).

31. *See* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 563 (1980).

32. *See* City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 424–25 (1993).

33. 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 503 (1996).

34. *See infra* Part III.

possible grounds for expanding consumer interests in the legal information market.

II. IS LEGAL INFORMATION SPEECH?

The First Amendment provides, in relevant part, that "Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances,"[35] and is made applicable to the states by the Fourteenth Amendment.[36] Does this constitutional protection encompass legal information when it is produced by lawyers?

The short answer is yes, at least in some instances. For over half a century, the Court has recognized some forms of lawyer speech as covered by the First Amendment, and through the years has derived a complex[37] framework of constitutional protection for various categories including legal advice,[38] advertising,[39] solicitation,[40] statements to the press,[41] bar admission and licensing,[42] and government attorneys.[43] The protection includes the right:

- of civil rights lawyers to advise prospective litigants "of their constitutional rights, urging them to institute litigation of a particular kind, recommending particular lawyers and financing such litigation";[44]
- of union members to "maintain and carry out their plan for advising workers who are injured to obtain legal advice";[45]
- to "hire attorneys . . . to assist . . . in the assertion of [one's] legal rights" for union members' workers compensation claims;[46]

---

35. U.S. CONST. amend. I.

36. U.S. CONST. amend. XIV.

37. Some would say not only complex, but confusing and convoluted. *See*, *e.g.*, Wendel, *supra*, note 12, at 312 ("[D]ecisions by courts considering free speech arguments by lawyers are surprisingly out of touch with the mainstream of constitutional law.").

38. *See* Renee Newman Knake, *Attorney Advice and the First Amendment*, 68 WASH. & LEE L. REV. 639 (2011).

39. *See, e.g.*, Milavetz, Gallop & Milavetz, P.C. v. United States, 130 S. Ct. 1324 (2010); Peel v. Attorney Registration and Disciplinary Comm'n, 496 U.S. 91, 100 (1990); *In re* R.M.J., 455 U.S. 191, 203 (1982); Zauderer v. Office of Disciplinary Counsel, 471 U.S 626 (1985); Bates v. State Bar, 433 U.S. 350, 383 (1977).

40. *See* Fla. Bar v. Went For It, Inc., 515 U.S. 618 (1995); Shapero v. Ky. Bar Ass'n, 486 U.S. 466 (1988); *In re* Primus, 436 U.S. 412 (1978); Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978); United Transp. Union v. State Bar, 401 U.S. 576 (1971); United Mine Workers of Am. v. Ill. State Bar Ass'n, 389 U.S. 217 (1967); Bhd. of R.R. Trainmen v. Va. State Bar, 377 U.S. 1 (1964); NAACP v. Button, 371 U.S. 415, 429 (1963).

41. *See* Gentile v. State Bar, 501 U.S. 1030 (1991); Garrison v. Louisiana, 379 U.S. 64 (1964).

42. *See* Keller v. State Bar, 496 U.S. 1 (1990); Law Students Civil Rights Research Council, Inc. v. Wadmond, 401 U.S. 154 (1971); *In re* Anastaplo, 366 U.S. 82 (1961); Konigsberg v. State Bar, 366 U.S. 36 (1961); *In re* Sawyer, 360 U.S. 622 (1959); Konigsberg v. State Bar, 353 U.S. 252 (1957).

43. *See* Garcetti v. Ceballos, 547 U.S. 410 (2006); Connick v. Myers, 461 U.S. 138 (1983).

44. *Button*, 371 U.S. at 447 (White, J., concurring in part and dissenting in part).

45. *Bhd. of R.R. Trainmen*, 377 U.S. at 8.

- to undertake "collective activity . . . to obtain meaningful access to the courts[, which] is a fundamental right within the protection of the First Amendment";[47]
- to publish "truthful advertisement concerning the availability and terms of routine legal services";[48]
- to "advise[] a lay person of her legal rights and disclos[e] in a subsequent letter that free legal assistance is available";[49]
- of an attorney to list "the areas of his practice, . . . the courts and States in which he had been admitted to practice,"[50] and "certified legal specialist"[51] on letterhead; and
- of an attorney to mail announcement cards to the public[52] as well as letters "to potential clients who have had a foreclosure suit filed against them."[53]

That certain forms of lawyer speech are covered[54] by the First Amendment is a relatively uncontroversial observation given this history.

The more complex answer lies in assessing the level of protection warranted by different kinds of legal information, particularly when the legal information is created and disseminated by an attorney. For example, elsewhere I have suggested that a heightened, strict scrutiny type of review should be applied to congressional constraints on legal advice.[55] Under this framework, a restriction on legal advice satisfying the standards of *Brandenburg v. Ohio*[56] (i.e., legal advice "directed to inciting or producing imminent lawless action and . . . likely to incite or produce such action"[57]) or advice to affirmatively engage in criminal or fraudulent activity (but not *about* engaging in criminal or fraudulent activity—a fine line, to be sure) would be constitutional, provided the restriction preserves the ability to

46. United Mine Workers of Am. v. Ill. State Bar Ass'n, 389 U.S. 217, 219 (1967).
47. United Transp. Union v. State Bar, 401 U.S. 576, 585 (1971).
48. Bates v. State Bar, 433 U.S. 350, 384 (1977).
49. *In re* Primus, 436 U.S. 412, 414 (1978).
50. *In re* R.M.J., 455 U.S. 191, 204 (1982).
51. Peel v. Attorney Registration and Disciplinary Comm'n, 496 U.S. 91, 97 (1990).
52. *In re* R.M.J., 455 U.S. at 204.
53. Shapero v. Ky. Bar Ass'n, 486 U.S. 466, 469 (1988) (internal quotation marks omitted). *But see* Fla. Bar v. Went For It, Inc., 515 U.S. 618 (1995) (upholding a Florida Bar rule banning lawyers from mailing letters to personal injury or wrongful death victims within thirty days of the accident).
54. The practice of law is what Robert Post would characterize as a discipline "regarded as contributing to the value of democratic competence [that] will receive First Amendment *coverage*, as distinct from First Amendment *protection*." POST, *supra* note 22, at 96. This means that government regulation "will raise First Amendment issues that must be resolved by distinctive First Amendment doctrinal tests." *Id.* This is not to say that the state cannot regulate lawyer speech, but that the state must prove its purpose "whenever it seeks to manipulate the creation and diffusion of disciplinary knowledge." *Id.* at 98.
55. *See, e.g.*, Knake, *supra* note 38.
56. 395 U.S. 444 (1969) (per curiam).
57. *Id.* at 447.

offer advice about good faith challenges to the law.[58] On the other side of the spectrum, a blanket ban on legal advice to engage in legal activity or to exercise political rights clearly would be constitutionally problematic.[59] But these are the easy types of cases. What about the more difficult cases?

A. Legal Information As Speech

A common thread among the various categories of legal information—legal documents, legal products, legal ideas, legal financials, public legal education, and some forms of legal advice—is that each is at least partially commercial in nature, whether explicitly as a product or service for sale or implicitly as inducement to use a particular product or service. For this reason, broadly speaking, one might characterize legal information as falling into the Supreme Court's commercial speech framework—i.e., speech that proposes a commercial transaction or is otherwise financially motivated. Financially motivated information is not removed from the ambit of the First Amendment simply because of its commercial nature. In the early 1970s, the *Virginia Weekly* published an advertisement on behalf of the Women's Pavilion of New York City containing information about the availability of legal abortions in New York.[60] The newspaper's editor-in-chief, Jeffrey Bigelow, was convicted in Albemarle County Circuit Court for violating a Virginia statute criminalizing the publication of an advertisement for "the procuring of an abortion or miscarriage."[61] Bigelow appealed, arguing that the statute infringed on his free speech rights.[62] The Supreme Court ultimately declined to address this issue, finding his claim moot in light of subsequent amendments to the statute by the Virginia legislature,[63] but Justice Blackmun's seven-to-two opinion sheds light on understanding the scope of First Amendment protection for legal information. First, he noted, "The existence of 'commercial activity, in itself, is no justification for narrowing the protection of expression secured by the First Amendment.'"[64] Importantly, the Court identified an informational interest that extends beyond an individual targeted by an advertisement to include "those with a general curiosity about, or genuine interest in, the subject matter or the law of another State and its

58. *Id.* A version of this restriction exists throughout the country—every jurisdiction has adopted a rule based upon MODEL RULES OF PROF'L CONDUCT R. 1.2 (2013) which provides, in relevant part:

> A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

Although California is an exception in not having adopted Model Rule 1.2 specifically, the legislature has enacted a similar type of provision for legal advice. *See* CAL. RULES OF PROF'L CONDUCT R. 3-210 ("Advising Violation of Law").

59. *See* Knake, *supra* note 38, at 698.

60. Bigelow v. Virginia, 421 U.S. 809, 811–12 (1975).

61. *Id.* at 813.

62. *Id.* at 815.

63. *Id.* at 818.

64. *Id.* (quoting Ginzburg v. United States, 383 U.S. 463, 474 (1966)).

development, and to readers seeking reform."[65] Thus, for the Court, "[t]he policy of the First Amendment favors dissemination of information and opinion,"[66] and as a corollary, the Court has found that there is a "First Amendment right to 'receive information and ideas,' and that freedom of speech 'necessarily protects the right to receive [this information].'"[67]

The Court's application of commercial speech scrutiny functions on an intermediate level, something less than political speech's strict scrutiny but something more than simply a rational basis.[68] The test as articulated in *Central Hudson Gas & Electric Corp. v. Public Service Commission* requires that "[i]f the communication is neither misleading nor related to unlawful activity, the . . . State must assert a substantial interest to be achieved by restrictions on commercial speech."[69] The Supreme Court has used this test in examining restrictions on attorney advertising the same way that it has done for other regulated industries.[70] Despite a seemingly clear-cut test, the line between commercial speech and political speech is hazy, particularly so when it involves information that goes to the heart of our democratic form of government. In my view, "access-to-the-law or delivery-of-legal-services speech in many ways serves the same function as political speech,"[71] even if it also has an advertising or marketing element, and ought to be treated as political speech even if it is delivered via a commercial process or if it demands financial support for effective dissemination.[72] Commercially delivered speech can be as important—perhaps even more important—than the proverbial street corner soapbox

65. *Id.* at 822.

66. *Id.* at 829 (citation omitted).

67. Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 757 (1976) (quoting Kleindienst v. Mandel, 408 U.S. 753, 762–63 (1972)) (internal quotation marks omitted).

68. It may be that certain of the professional conduct restrictions discussed herein as susceptible to a First Amendment challenge fail even to survive rational basis review. For example, Cassandra Burke Robertson offers a compelling argument that no rational basis exists for the corporate practice doctrine restriction on nonlawyer ownership of law practices in her article *Private Ordering in the Market for Professional Services*, 94 B.U. L. REV. 179 (2014). *But see* Lawline v. Am. Bar Ass'n, 956 F.2d 1378 (7th Cir. 1992) (holding that Model Rules 5.4(b) and 5.5(b) are rationally related to the legitimate state interests of safeguarding the public, maintaining the integrity of the legal profession, and protecting the administration of justice, and that there was no First Amendment violation in prohibiting association of nonlawyers in partnership with lawyers); Turner v. Am. Bar Ass'n, 407 F. Supp. 451 (N.D. Tex. 1975) (finding no violation of nonlawyers' First Amendment rights in a ban on partnership between a lawyer and nonlawyers).

69. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 564 (1980).

70. *See, e.g.*, Fla. Bar v. Went For It, Inc., 515 U.S. 618, 623–24 (1995) ("First, the government must assert a substantial interest in support of its regulation; second, the government must demonstrate that the restriction on commercial speech directly and materially advances that interest; and third, the regulation must be 'narrowly drawn.'" (quoting *Cent. Hudson*, 447 U.S. 564–65) (internal quotation marks omitted)); *see also Cent. Hudson*, 447 U.S. at 564–65.

71. Renee Newman Knake, *Democratizing the Delivery of Legal Services*, 73 OHIO ST. L.J. 1, 25 (2012).

72. *See* MARTIN H. REDISH, MONEY TALKS: SPEECH, ECONOMIC POWER, AND THE VALUES OF DEMOCRACY 2 (2001) ("In light of modern economic realities and the structure of modern communications, expression often requires significant financial resources in order to be effective.").

speaker's political commentary. This was Justice Harry Blackmun's view over three decades ago in *Bates* and his view has been carried forward by the modern Court, most recently by Justice Kennedy in the recent decision *Sorrell v. IMS Health, Inc.*

B. Sorrell v. IMS Health *and Its Implications for Legal Information*

In *Sorrell*, the Court seemingly expanded First Amendment coverage by holding that "the creation and dissemination of information are speech within the meaning of the First Amendment" deserving of a heightened protection beyond that traditionally accorded to commercial speech.[73] The 2011 decision involved a Vermont statute banning the sale (or gifting) of physician prescription records by pharmacies or data miners absent physician permission.[74] The information was highly valuable for commercial purposes to companies marketing pharmaceutical drugs to doctors and patients, and for that reason, might have been treated as commercial speech.[75] Nevertheless, the Court applied a "heightened" level of review to strike the state law.[76] The decision has generated a good deal of debate, along with many questions about how, precisely, the Court's free speech jurisprudence may evolve to cover data and information in the future.

Some contend that the *Sorrell* decision signals the demise of the commercial speech doctrine.[77] Others argue that the majority got it wrong and, presumably, they expect a correction to occur as more First Amendment challenges involving data and information reach the Court.[78] Regardless of whether the commercial speech doctrine lives on in some form or not, however, the Court is likely to continue to face additional disputes related to how society values access to and receipt of information, particularly as technology allows for the increased production of cheaper and more nuanced data streams along with more sophisticated knowledge about the meaning of mass quantities of information and data. If it is

---

73. Sorrell v. IMS Health, Inc., 131 S. Ct. 2653, 2659, 2667 (2011) ("Speech in aid of pharmaceutical marketing, however, is a form of expression protected by the Free Speech Clause of the First Amendment [and] . . . must be subjected to heightened judicial scrutiny.").

74. *Id.* at 2659.

75. *Id.*

76. *Id.* at 2667.

77. *See, e.g.*, Linda Greenhouse, *Over the Cliff*, N.Y. TIMES (Aug. 24, 2011, 9:00 PM), http://opinionator.blogs.nytimes.com/2011/08/24/over-the-cliff/?_r=0 ("It is an article of faith within the Roberts court majority that of course corporations have full speech rights when it comes to public affairs—and they have something rapidly approaching full speech rights when it comes to selling their wares as well, since the doctrine hammered out during the Burger years that recognized 'commercial speech' but assigned it a lower level of protection is close to collapse. It's all just speech now.").

78. *See, e.g.*, Lowe v. SEC, 472 U.S. 181, 232 (1985) (White, J., concurring) ("Just as offer and acceptance are communications incidental to the regulable transaction called a contract, the professional's speech is incidental to the conduct of the profession."); Tamara R. Piety, *"A Necessary Cost of Freedom"? The Incoherence of* Sorrell v. IMS, 64 ALA. L. REV. 1, 2 (2012) ("The notion that unrestrained freedom for commercial speech is a 'necessary cost of freedom' is not just wrong, it is dangerously wrong.").

correct that freedom of speech covers the creation and dissemination of information as a general matter, does it not likewise cover the creation and dissemination of information about law? And how might this impact the way lawyers are regulated in their dissemination of legal information?

To the extent *Sorrell* is the new standard, a number of regulations covering the organizational form of law practice and distribution of legal services may be constitutionally vulnerable. This view is strengthened in light of the majority opinion in *Citizens United v. FEC*, which expanded First Amendment protection for corporations on the same terms as individuals[79] and broadened prior decisions related to increasing the free flow of speech to further economic competition.[80] In shielding the method for creating and disseminating speech produced as part of a regulatory scheme, as well as the speech itself, from government interference, the Court not only rejected *Central Hudson*'s balancing approach but also recognized the modern realities of information access and delivery. Protecting the mode of transmission is as important as protecting the content.

John McGinnis's property-based understanding of the First Amendment offers useful insight here particularly because it situated within an information-driven understanding of the First Amendment.[81] According to McGinnis, a "property-rights vision" of the First Amendment "would immunize commercial speech from regulation unless it threatens property through force or fraud."[82] His critique of the *Central Hudson* test is that it "does not require that the regulation of speech be premised on some threat to property or life," which means "it can be applied to restrict even truthful advertising of the opportunity to engage in otherwise legal conduct."[83] Under McGinnis's view, "[b]y narrowly circumscribing regulatory power over speech to that necessary to prevent harm to life or property, a property-based interpretation of the First Amendment would lead to greater opportunities for commercial uses of the emerging information communication networks."[84] The informational interests at stake drive McGinnis's position.

---

79. *See* Citizens United v. FEC, 558 U.S. 310, 315 (2010) ("[T]he Government may not suppress political speech on the basis of the speaker's corporate identity. No sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations."). "The Court has thus rejected the argument that political speech of corporations or other associations should be treated differently under the First Amendment simply because such associations are not 'natural persons.'" *Id.* at 343; *see also* Knake, *supra* note 71 (arguing that, under *Citizens United*, corporations have a First Amendment right to engage in the delivery of legal services).

80. *Citizens United*, 558 U.S. at 363–64.

81. John O. McGinnis, *The Once and Future Property-Based Vision of the First Amendment*, 63 U. CHI. L. REV. 49, 56 (1996).

82. *Id.* at 128.

83. *Id.* at 128–29.

84. *Id.* at 129. This conceptualization of the First Amendment is consistent with the conception of the lawyer's specialized role in the preservation of democratic government. *See, e.g.*, Geoffrey C. Hazard, Jr., *The Future of Legal Ethics*, 100 YALE L.J. 1239, 1246 (1991) ("The lawyer's work consists of resistance to government intervention in the lives, liberty, or property of private parties.").

For most citizens, information is consumed in direct proportion to its entertainment value. For this reason, says McGinnis, as with "other products, information will have to be attractively packaged to gain a wide audience, and, as with other products, private entrepreneurs are likely to be more successful than government at doing this, even when packaging public policy information."[85] Thus, regulation that prevents or limits the capacity of an information provider to engage in this sort of marketing and branding would violate the First Amendment. Furthermore, as McGinnis observes, "the regime of property rights in information transmission does its best to ameliorate civic ignorance. As the owners of information compete to package it in a form in which citizens will be interested, information becomes more accessible."[86] Ultimately, under his "property-rights regime," informational, commercial speech warrants the same level of scrutiny as political or artistic speech, which is essentially the result in *Sorrell*.

In short, under this view, organization and distribution rules wholly foreclosing a particular avenue for providing legal information would not be sustainable under a property-based, information-driven understanding of the First Amendment, though disclaimer requirements keyed to fraud and force might be. This fails to account, however, for regulations constraining lawyer speech to cultivate and preserve democratic competence and disciplinary knowledge, such as American Bar Association (ABA) Model Rule of Professional Conduct Rule 1.6 on attorney-client confidentiality[87] or Rule 3.6 on statements about pending cases and trial publicity.[88] Under an information-driven prioritization alone, it would be difficult to justify the degree of restriction on an attorney's speech that is necessary to preserve these obligations. This does not necessarily mean the First Amendment forecloses the state's capacity to regulate; rather, we must explore the constitutional values at stake and the degree of regulation warranted.

The balance between public access to knowledge about law generally and individual access to uniquely tailored advice and advocacy is delicate. Robert Post observes, "To preserve the self-government of the people, we must preserve their access to knowledge. We must safeguard their democratic competence,"[89] which means there are times where the First Amendment contemplates restrictions upon speech for this purpose. As Post explains, his term "[d]emocratic competence refers to the cognitive empowerment of persons within public discourse, which in part depends on their access to disciplinary knowledge. Cognitive empowerment is necessary both for intelligent self-governance and for the value of

85. McGinnis, *supra* note 81, at 122 ("Moreover, the property-centered information regime, unlike the regulatory regime of current self-governance theorists, recognizes that the prospect of being entertained is most likely to entice citizens to become informed citizens in the first place.").

86. *Id.* at 126.

87. *See* MODEL RULES OF PROF'L CONDUCT R. 1.6 (2013).

88. *See id.* R. 3.6.

89. POST, *supra* note 22, at 95.

democratic legitimation."[90] For Post, "[d]emocratic *legitimation* requires that the speech of all persons be treated with toleration and equality. Democratic *competence*, by contrast, requires that speech be subject to a disciplinary authority that distinguishes good ideas from bad ones."[91] He believes that the "commercial speech doctrine is best explained as resting on the constitutional value of democratic competence,"[92] and that "[t]here are also scattered court decisions that serve this same value by protecting the distribution of disciplinary knowledge outside of public discourse."[93] Post points out that, at times, regulation is necessary in order to secure democratic competence through expert knowledge because "[b]y guaranteeing that clients can plan to rely on expert professional judgment, law endows such communication with the status of knowledge."[94]

This intersection between commercial speech and disciplinary knowledge elucidates the magnitude of the public's interest in free-flowing legal information. Post's democratic competence-centered approach reveals why the First Amendment permits some regulation of lawyer speech to protect clients and to facilitate competent legal representation. Moreover, regulation must be designed to incentivize legal training such that a lawyer can recoup the time and expense of having acquired the specialized professional skill. In other words, some constraint on lawyer speech is necessary to protect and cultivate the special attributes comprising the professional capabilities of what it means to be a lawyer.[95]

C. The Value of Legal Information to the Consumer Law Market: Hunter v. Virginia State Bar *As a Case Study*

To understand the First Amendment's application in the context of legal information for the consumer law market, consider Horace Frazier Hunter, a Virginia criminal defense lawyer who authored a blog called *This Week in Richmond Criminal Defense*.[96] Hunter blogged primarily about his own criminal cases. He wrote about repeated successful resolutions, both settlements and trials. Though he posted about his cases, at least in part, for the purpose of attracting new clients, he did not include the advertising disclaimer required by the Virginia State Bar, i.e., a line stating that previous results are not predictors of future success. In writing about his cases, Hunter used the real names of real clients who were acquitted or who

90. *Id.* at 33–34.
91. *Id.* at 34.
92. *Id.* at 35.
93. *Id.* ("[These decisions] yield the unexpected conclusion that our First Amendment has been interpreted to shield from unchecked political control the authoritative disciplinary practices that produce expert knowledge.").
94. *Id.* at 45.
95. *See, e.g.*, Kobayashi & Ribstein, *supra* note 9, at 1218 ("[A]ccess must be balanced with creation incentives through such mechanisms as fair use and mandatory licensing rules."); Jane Yakowitz Bambauer, *Is Data Speech?*, 66 STAN. L. REV. 57, 112 (2014) ("Seclusion is not the only legitimate basis for limiting the creation or dissemination of data. The public's interest in the confidentiality of certain special relationships . . . can be a compelling reason . . . .").
96. Hunter v. Va. State Bar, 744 S.E.2d 611, 614 (Va. 2013).

received favorable plea bargains as a result of his negotiations. He admitted that he used clients' names without their consent. Notably, all of the information he placed on his blog could also be found in the public record of criminal proceedings. In essence, Hunter served as a curator of the information and a facilitator for the free flow of legal information.

The Virginia State Bar disciplined Hunter for disseminating this legal information via his blog. Hunter received a public reprimand, and appealed on First Amendment grounds. The Virginia Supreme Court agreed with Hunter's argument that blogging is protected free speech and reversed the discipline, though treated it as commercial speech, which could be subject to the disclaimer requirement but not banned entirely.[97] In other words, the court held that the bar may not ban attorneys from describing public facts even if they are potentially embarrassing or harmful to the client, and even absent client consent, so long as the facts are not protected by attorney-client privilege.

In reaching this result, the court prioritized the general availability of information about legal services over an individual client's expectation of confidentiality,[98] a conclusion that has sparked considerable outrage.[99] The Virginia State Bar had urged the court to adopt its interpretation of an attorney's confidentiality obligation as "prohibit[ing] an attorney from repeating truthful information made in a public judicial proceeding even though others can disseminate this information because an attorney repeating it could inhibit clients from freely communicating with their attorneys or because it would undermine public confidence in the legal profession."[100] Rejecting the bar's view, the court declined to permit privacy, confidentiality, and public confidence considerations to trump the distribution of legal information to the public once the representation has concluded.[101]

Hunter provides an interesting case for reflection upon the nature of legal information and its importance to the public consumer law market. The legal information at issue in *Hunter*—facts about completed criminal law cases—is available in the public record, even without Hunter's involvement. Yet the information takes on enhanced meaning because of the way it is disseminated, and by whom—here, a lawyer. When Hunter blogs, he increases the amount of free-flowing information about law in the public sphere. Rather than sitting in some obscure court file, the

97. Hunter had argued that his blogging constituted political speech, even though a component of it was marketing. *See id.* at 622.

98. *See id.* at 620 ("To the extent that the information is aired in a public forum, privacy considerations must yield to First Amendment protections.").

99. *See, e.g.*, Andrew Perlman, *More on the Confidentiality Implications of Hunter v. Virginia State Bar*, LEGAL ETHICS F. BLOG (June 9, 2013, 8:20 PM), http://www.legalethicsforum.com/blog/2013/06/hunter_case.html ("At the recent ABA National Conference on Professional Responsibility, one of the panels focused on the *Hunter* case. I think it's fair to say that many members of the audience were somewhat critical of the Court's decision. Many of us thought that we would have to rethink the scope of a lawyer's duty of confidentiality if the case's reasoning is widely followed.").

100. *Hunter*, 744 S.E.2d at 620.

101. *Id.*

information is now curated, pieced together with the most relevant and interesting facts, posted in a targeted way for a mass audience. Hunter's blog serves numerous functions—advertising and marketing,[102] education about legal entitlements and obligations,[103] news reporting,[104] and criticism of the legal system[105] to name a few. His blog may be increasing the likelihood that an individual facing a criminal sanction will hire an attorney, thereby reducing search costs. Hunter may very well also be gathering information about potential clients based upon their visits to his blog site to help ascertain their legal needs. In terms of quality, Hunter's blog becomes something of a self-policing tool; Hunter is engaged in branding through dissemination of information about his legal work and has an interest in maintaining a particular public image. This incentivizes quality representation so as to not compromise his brand reputation. His use of real client names and stories lends credibility and legitimacy. Finally, because he is blogging as a lawyer, he likely increases the possibility that individuals with a legal problem will read the information.

The *Hunter* opinion generated strong reactions from scholars, regulators, and lawyer ethics experts, many of them unfavorable.[106] These critics take the position that lawyers must adhere to the duty of confidentiality even at the expense of disseminating truthful, public legal information.[107] A primary justification for this viewpoint is a desire to encourage clients' full and frank disclosures to their attorneys under the cloak of confidentiality. If clients fear their attorneys may discuss public facts about their case, so the argument goes, clients may be less than forthcoming in sharing information essential to the representation. This position fails, however, to recognize the value of legal information to others who may benefit and learn about their own legal needs. It also fails to consider that clients with legal problems may have strong incentives to fully disclose their situations even without confidentiality protections.[108] This calculus leaves no room for acknowledging the public's interest in the dissemination of legal information found in court records. Critics say, "The fact that the information is available to the public doesn't mean it is known by the public."[109] But it seems this is precisely the point for the court in *Hunter*: legal information ought to be more available to those who currently lack it, not less so. This prioritization of interests is consistent with the First

102. *Id.* at 617; *id.* at 622 (Lemon, J., dissenting in part).
103. *Id.*
104. *Id.*
105. *Id.*
106. *See, e.g.*, Richard Zitrin, *Viewpoint: Guard Your Clients' Public Secrets*, RECORDER, June 7, 2013, at 6, 6; Richard Zitrin, *Viewpoint: Court Struggles To Regulate Attorney Blogging*, U. CAL. HASTINGS C.L. (May 17, 2013), http://www.uchastings.edu/news/articles/2013/05/zitrin-attorney-blogging.php.
107. *See* Margaret Tarkington, *A First Amendment Theory for Protecting Attorney Speech*, 45 U.C. DAVIS L. REV. 27 (2011); Zitrin, *supra* note 106 (arguing that an attorney must "maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client").
108. *See* Daniel R. Fischel, *Lawyers and Confidentiality*, 65 U. CHI. L. REV. 1, 1 (1998).
109. *Id.*

Amendment's interest in the free flow of information. This suggests the attorney may very well be best situated for disseminating *Hunter*-type information in order to help the public address its legal information needs. The decision strikes a difficult balance between preserving the attorney-client relationship (for example, only publicly available, nonprivileged information may be discussed by the attorney after conclusion of the proceedings—all other nonpublic information remains subject to Rule 1.6 confidentiality protections and Rule 3.6 trial publicity limitations) and promoting the distribution of public legal information, furthering both the administration of justice and public understanding of the legal system as a whole. Admittedly, this is a shift away from a loyalty-driven paradigm of the lawyer-client relationship toward an enhanced legal information marketplace for the public. The *Hunter* court espouses a world where loyalty is prioritized for the duration of the matter but then subordinated to public informational interests at the conclusion of the representation. This result seems driven by the public's legal information interests first articulated in *Bates* and, perhaps, further supported by, the Court's protection of the creation and dissemination of information in *Sorrell*.

III. THE FUTURE FOR LAWYER REGULATION IN A POST-*SORRELL* WORLD

To the extent I am correct in suggesting that the creation and dissemination of legal information by lawyers is covered speech, several existing professional regulations are constitutionally vulnerable.

A. Nonlawyer Ownership/Investment and Multidisciplinary Partnership Bans

The ABA has long opposed external ownership and investment by non-lawyers into law firms, a position embodied in Model Rule 5.4.[110] The Rule dates to the 1920s,[111] though the ban originated in a 1909 New York criminal statute enacted out of competitive concerns from individual lawyers who feared corporations contracting with lawyers to offer bulk legal advice by subscription.[112] The prohibition has continued even in the face of regular debate over its efficacy and purpose throughout the decades. In the 1960s, one critic suggested that both "courts, as well as the bar associations, have too frequently been guided by the literal application of negative limitations without inquiring into the affirmative purposes which

110. MODEL RULES OF PROF'L CONDUCT R. 5.4 (2013). Model Rule 5.4 mandates, "A lawyer or law firm shall not share legal fees with a nonlawyer" and "shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law." *Id.* The Rule further provides, "A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit if . . . a nonlawyer owns any interest therein" or "a nonlawyer is a corporate director or officer." *Id.*

111. *See* CANONS OF PROF'L ETHICS Canon 33 (1928) (amended 1937). For more on the history of the rule, see Edward S. Adams & John H. Matheson, *Law Firms on the Big Board?: A Proposal for Nonlawyer Investment in Law Firms*, 86 CALIF. L. REV. 1 (1998).

112. *See* Bruce A. Green, *The Disciplinary Restrictions on Multidisciplinary Practice: Their Derivation, Their Development, and Some Implications for the Core Values Debate*, 84 MINN. L. REV. 1115, 1126–28 (2000).

the limitations are intended to aid or into the new conditions and situations under which novel problems are presented."[113] Nevertheless, members of the bar in considering at the time whether a corporation might own a law firm "stated that 'no amount of data could justify' a plan then under consideration for a new form of bringing legal services to the middle classes."[114] Again, the concept was dismissed in the 1980s under a "fear of Sears" argument, the idea that legal services offered by a mass retailer such as Sears would fundamentally compromise lawyers' capacity to competently and ethically serve clients.[115] Most recently, while the ABA's Commission on Ethics 20/20 (20/20 Commission) at one point approved the drafting of a proposed change to Model Rule 5.4 that would allow law firms to include nonlawyers in minority ownership roles, the revision ultimately was rejected.[116] To date no state courts or bar authorities have engaged in a successful effort to liberalize the nonlawyer ownership or multidisciplinary partnership restrictions (beyond Washington, D.C.'s very limited exception that permits multidisciplinary practices among lawyers and nonlawyers[117]). Only one state legislature has considered the issue, but the bill to enable up to 49 percent nonlawyer ownership died in committee.[118]

The plaintiffs' law firm Jacoby & Meyers recently filed lawsuits in Connecticut, New Jersey, and New York attacking the ban on First Amendment and other constitutional grounds.[119] The firm asserts that, "to

113. ELLIOTT CHEATHAM, A LAWYER WHEN NEEDED 81 (1963).

114. *Id.* (quoting *Report of the Special Committee on Legal Clinics*, 65 ANN. REP. A.B.A. 451, 453 (1940)).

115. *See, e.g.*, Susan Gilbert & Larry Lempert, *The Nonlawyer Partner: Moderate Proposals Deserve a Chance*, 2 GEO. J. LEGAL ETHICS 383, 392–400 (1988) (noting that debate about reform to Model Rule 5.4 during a February 1983 ABA meeting was essentially shut down on the "fear of Sears," the idea that Sears could own a law firm). The ABA Commission on Evaluation of Professional Standards debated the nonlawyer ownership and investment question during the early 1980s, but did not take action. *See generally* Charles W. Wolfram, *The ABA and MDPs: Context, History, and Process*, 84 MINN. L. REV. 1625 (2000); *see also* Thomas R. Andrews, *Nonlawyers in the Business of Law: Does the One Who Has the Gold Really Make the Rules?*, 40 HASTINGS L.J. 577 (1989).

116. *See* Ted Schneyer, *"Professionalism" As Pathology: The ABA's Latest Policy Debate on Nonlawyer Ownership of Law Practice Entities*, 40 FORDHAM URB. L.J. 75, 137 (2012) ("I was disappointed that the 20/20 Commission decided not to recommend our proposal for adoption by the ABA House of Delegates. Our Draft Resolution and Draft Report remain in the ABA archives, but no relaxation of the ban on nonlawyer ownership of law firms by the ABA or state supreme courts seems likely in the short term—unless, of course, the ban is struck down in litigation.").

117. *See* Unauthorized Practice/Fee Splitting, [Practice Guides] Laws. Man. on Prof'l Conduct (ABA/BNA) 91:402 (2014) (explaining that apart from one exception (the District of Columbia), few significant variations from Model Rule 5.4(b) or (d) have arisen in the states that have based their ethics rules on the Model Rules). While the District of Columbia permits certain multidisciplinary practices, it does not authorize external ownership of a law firm. For example, the ability of a corporation to provide legal services. *See* D.C. RULES OF PROF'L CONDUCT R. 5.4(b).

118. *See* An Act to Allow Nonattorney Ownership of Professional Corporation Law Firms, Subject to Certain Requirements, S. 254, 2011–2012 Gen. Assemb., 2011 Sess. (N.C. 2011), *available at* http://www.ncleg.net/Sessions/2011/Bills/Senate/HTML/S254v0.html.

119. In May 2011, Jacoby & Meyers filed three lawsuits challenging the external ownership/investment ban in ABA Model Rule 5.4 in New York, New Jersey, and

ensure the public's greatest possible access to legal representation and protection of their rights through the civil justice system in an affordable, cost-effective way, Jacoby & Meyers requires a substantial infusion of new capital," but due to Rule 5.4 and related provisions it has been "relegated to obtaining capital from (i) the personal contributions of the partners, (ii) retained earnings on fees generated and collected, and (iii) commercial bank loans, which invariably come with onerous interest rates."[120] These options "for capital infusion are either too expensive or unavailable," and the firm "has been unable to entertain the numerous offers it has received from prospective non-lawyer investors . . . who are prepared to invest capital in exchange for owning an interest in the firm."[121] As such, the lawsuit contends that "restrictions on the ability of firms to provide legal representation, and on non-lawyers to economically associate with lawyers for that purpose, are impermissible restrictions on First Amendment rights."[122]

The policy underlying the resistance to a corporate ownership structure for law firms has been couched largely in terms of professionalism and lawyer independence. This is explicit on the face of the rule (entitled "Professional Independence of a Lawyer"[123]) and implicit in the debates and commentary about the purpose of the rule over the years.[124] According

---

Connecticut. *Jacoby & Meyers Files Landmark Suits in 3 States To Overturn Laws Restricting Access to Capital for Law Firms*, LEGAL ACCESS FOR ALL (May 18, 2011), http://legalaccessforall.org/; *see also* Mark Hamblett, *Suit Challenges N.Y. Prohibition of Non-lawyer Firm Ownership*, N.Y. L.J., May 20, 2011, at 1, 5. At the time of this writing, the New Jersey litigation had been remitted by the U.S. District Court for the District of New Jersey to the Supreme Court of New Jersey for review. *See* Sindhu Sundar, *NJ Judge Won't Toss Outside Investor Law Firm Suit*, LAW360 (Mar. 7, 2012, 5:29 PM), http://www.law360.com/articles/317067/nj-judge-won-t-toss-outside-investor-law-firm-suit. A motion to dismiss pending in the District of Connecticut remained undecided. *Cf.* Transcript of Oral Argument, Jacoby & Meyers Law Offices, LLP v. Judges of the Conn. Superior Court, No. 3:11CV817(RNC) (D. Conn. Mar. 19, 2012). The New York litigation, after a hearing on standing issues before the Second Circuit Court of Appeals, was proceeding in the Southern District of New York, where Jacoby & Meyers filed a Second Amended Complaint for Declaratory Judgment and Injunctive Relief, curing the standing issues, in June 2013. *See* Second Amended Complaint for Declaratory and Injunctive Relief, Jacoby & Meyers, LLP v. Schneiderman, No. 11-3387 (LAK) (S.D.N.Y. June 21, 2013). A motion to dismiss remained pending. *Cf.* Reply Memorandum of Law in Further Support of Defendant's Motion To Dismiss Plaintiff's Second Amended Complaint, *Schneiderman*, No. 11-3387 (LAK) (S.D.N.Y. Sept. 27, 2013), ECF No. 119.

120. Second Amended Complaint for Declaratory Judgment and Injunctive Relief, *supra* note 119, ¶¶ 38–40.

121. *Id.* ¶ 41.

122. *Id.* ¶ 77.

123. MODEL RULES OF PROF'L CONDUCT R. 5.4 (2013).

124. *See, e.g.*, David B. Wilkins, *Who Should Regulate Lawyers?*, 105 HARV. L. REV. 799, 853 (1992) ("Independence arguments have always had a privileged status in professional discourse. For example, the claim that there is an inherent link between the current disciplinary system and the status of lawyers as 'independent professionals' is firmly rooted in precedent, practice, and professional mythology."); *see also* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 10(b) (2000) ("Those limitations are prophylactic and are designed to safeguard the professional independence of lawyers. A person entitled to share a lawyer's fees is likely to attempt to influence the lawyer's activities so as to maximize those fees. That could lead to inadequate legal services.").

to the *Restatement (Third) of the Law Governing Lawyers*, "the concern is that permitting such ownership or direction would induce or require lawyers to violate the mandates of the lawyer codes, such as by subjecting the lawyer to the goals and interests of the nonlawyer in ways adverse to the lawyer's duties to a client."[125] Yet, foreign jurisdictions allowing for nonlawyer ownership and investment in law practices have not experienced a flood of client complaints about a lack of lawyer professionalism, independent judgment, or other protection elements.[126] Pressures related to revenue generation or time constraints, the sources of greatest concern for undue influence by nonlawyers, are equally, if not more present under accepted organizational structures such as the solo practice, partnerships, and limited liability partnerships. A more cynical, though perhaps also more accurate, view is that the rhetoric of professionalism, independence, and protection are pretext for monopolistic protectionism designed to limit the availability of legal services and maintain the price of legal services at an artificially high level, thus preserving the status quo that has been so profitable for the lawyers who have created and enforced the regulatory structure in the past.

An alternative reading of Rule 5.4 is to consider it as an organization or distribution rule, not a professional competence rule. Looking beyond the characterization of professional independence—and instead examining the rule for what it bans, a particular form of business structure for law practices—reveals why the rule unconstitutionally restricts the free flow of legal information. Under existing regulation, lawyers may only organize as sole proprietorships, partnerships, limited liability partnerships, limited liability companies, or professional corporations, all entirely owned by lawyers, thus removing the possibility for investment from outside sources. Model Rule 5.4 forecloses one of the most common and effective business structures designed to reduce the very concerns regarding professional independence that the Rule purports to address—the corporate form.[127] The corporation is designed to operate independently from the owners of the business (and their individual self-interest). By providing owners with personal asset protection, the corporate form protects against decisions that one might make driven by personal financial motive and instead elevates the business's best interest. The corporate form also facilitates access to capital for investing in enhanced technology, branding and marketing,

125. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 10(c).

126. Australia adopted the Legal Profession Act in 2004, authorizing nonlawyers to own shares in Australian law firms. Australian firm Slater & Gordon became the first publicly traded law firm in the world in May 2007. *See* Peter Lattman, *Slater & Gordon: The World's First Publicly Traded Law Firm*, WALL ST. J. (May 22, 2007, 9:19 AM), http://blogs.wsj.com/law/2007/05/22/slater-gordon-the-worlds-first-publicly-traded-law-firm/. In 2007, England and Wales adopted the Legal Services Act, similarly facilitating nonlawyer ownership and investment in law practices. Legal Services Act, 2007, c. 29, § 1(e) (Eng.). Since the Act became fully effective in 2011, over 200 organizations have obtained licenses as alternative business structures to offer legal services at all levels of the market, including the consumer law market.

127. *See generally* Henry Hansman & Reinier Kraakman, *The Essential Role of Organizational Law*, 110 YALE L.J. 387 (2000).

research and development, and expanded services. While Rule 5.4 has been couched in terms of professional independence, the Supreme Court has long recognized that the corporate form, in and of itself, does not compromise a lawyer's judgment.[128] The Rule blocks methods for creating and disseminating legal information from a significant source—the corporation—absent a professional expertise justification. In a post-*Sorrell* world, this seems no longer sustainable.

B. Unauthorized Practice of Law Statutes and Geographic Restrictions

Following the Court's 1963 decision in *NAACP v. Button*, commentators speculated that the Court would soon liberalize unauthorized practice of law restrictions to permit legal services offered by "lay intermediaries" beyond licensed attorneys.[129] As it turns out, this was not to be. It is a prospect worth revisiting especially given the plight of the consumer law market. Fifty years post-*Button*, Professor Elliott Cheatham's observations suggesting conclusions from the *Button* decision prove prescient and enduring:

> [I]t seems likely that, as a result of the decision, lay intermediaries of varied sorts will shortly urge constitutional support for their activities. Consequently, it is all the more urgent that the bar reconsider its regulations for preventing professional abuses in the light of the new measures that are needed to bring legal services to the middle classes.[130]

Model Rule 5.5(a) states, "A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so."[131] The ABA has left to individual states to determine what precisely constitutes the practice of law, a definition that at best is imprecise and at worst is utterly indeterminable.[132] The ambiguous

---

128. *See* NAACP v. Button, 371 U.S. 415, 428–29 (1963) (recognizing the First Amendment right of nonprofit corporations to provide legal services); *see also* Citizens United v. FEC, 558 U.S. 310, 365 (2010) ("[T]he Government may not suppress political speech on the basis of the speaker's corporate identity. No sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations.").

129. Elliott E. Cheatham, *A Lawyer When Needed: Legal Services for the Middle Classes*, 63 COLUM. L. REV. 973, 973, 985 (1963) ("Are organizations that furnish legal services protected by the federal constitution from condemnation as lay intermediaries by state laws or professional standards? The question was recently made explicit by the Supreme Court of the United States in *NAACP v. Button*.").

130. *Id.* at 986. Cheatham is not the only scholar to make this recommendation. *See, e.g.*, DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY 269 (1988) (arguing for deregulation of "the market for routine legal services—wills, probate, real estate closings, uncontested divorces, and so forth—by allowing nonlawyers and paralegals to perform them); Thomas D. Morgan, *The Evolving Concept of Professional Responsibility*, 90 HARV. L. REV. 702 (1977); Deborah L. Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 STAN. L. REV. 1 (1981) (examining the bar's unauthorized practice campaign and the related constitutional implications, arguing for alternatives to prioritize First Amendment and due process values).

131. MODEL RULES OF PROF'L CONDUCT R. 5.5(a) (2013).

132. *See* Catherine J. Lanctot, *Does LegalZoom Have First Amendment Rights?: Some Thoughts About Freedom of Speech and the Unauthorized Practice of Law*, 20 TEMP. POL. & CIV. RTS. L. REV. 255 (2011) (examining the implications of challenging companies like

nature of the definition of law practice has led many to speculate upon the constitutionality of these restrictions for that reason alone.[133] States generally "have drawn a distinction between giving generic legal information and giving personalized legal advice,"[134] but beyond this have offered little guidance. Currently, with very few exceptions, only licensed attorneys may engage in a wide-sweeping range of activities falling under "practice of law" and they may do so only in the particular state where licensed.[135]

Setting aside the problematic nature of the definitional ambiguity, it is also complicated to assess how best to balance the free flow of legal information against the need to incentivize and protect professional judgment and disciplinary knowledge. Adding to the complexity is the additional inquiry related to nonhuman law practice, i.e., self-help books and computerized legal forms.[136] For example, does computer software that takes an individual through a decision-tree process for completing legal forms constitute the practice of law? In many jurisdictions, the answer would be yes under existing unauthorized practice of law statutes, though legislative action has been taken in at least one state to make clear that it does not, provided that the software include a disclaimer that it is not a substitute for a lawyer's services.[137] The latter stance is in the spirit of an

---

LegalZoom and potential defenses to the charge of unauthorized practice of law from a First Amendment standpoint). "A significant part of the [First Amendment] problem is the legal profession's notorious inability to produce a principled definition of the practice of law." *Id.* at 262.

133. *Id.*

134. *Id.* at 265.

135. Some states are in the process of assessing the merits of authorizing nonlawyers to perform certain services and tasks that currently require a law license. For example, Chief Judge Jonathan Lippman of the New York Court of Appeals convened a task force in 2013 to study this issue, and the New York City Bar Committee on Professional Responsibility issued a report recommending that trained nonlawyers be allowed to serve as advocates in some court and agency tribunals and also to advise on certain matters outside of tribunals. *See* N.Y.C. Bar Ass'n Comm. on Prof'l Responsibility, *Narrowing the "Justice Gap": Roles for Nonlawyer Practitioners* (June 2013), http://www2.nycbar.org/pdf/report/uploads/20072450-RolesforNonlawyerPractitioners.pdf. Even more proactive, the Washington Supreme Court recently adopted a rule allowing "limited license legal technicians" to perform some of these services and tasks. *See* WASH. ADMISSION TO PRACTICE R. 28. While the Washington Court acknowledged that this rule likely would result in work previously done by lawyers to be taken over by nonlawyers, it prioritized the unmet need for informed advice. The State Bar of California heard testimony about a similar type of proposal during the summer of 2013. *See Limited License Working Group*, ST. B. CAL., http://www.calbar.ca.gov/AboutUs/BoardofTrustees/LimitedLicenseWorkingGroup.aspx (last visited Apr. 26, 2014). According to a 2012 report conducted by the ABA Standing Committee on Client Protection, "[t]wenty-one jurisdictions authorize nonlawyers to perform some legal services in limited areas." AM. BAR ASS'N STANDING COMM. ON CLIENT PROT., 2012 SURVEY OF UNAUTHORIZED PRACTICE OF LAW COMMITTEES REPORT (2012), *available at* http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/2012_upl_report_final.authcheckdam.pdf.

136. *See, e.g.*, Katz, *supra* note 15.

137. *See* Unauthorized Practice of Law Comm. v. Parsons Tech., Inc., No. Civ. A. 3:97CV-2859, 1999 WL 47235, at *4–7 (N.D. Tex. Jan. 22, 1999), *vacated and remanded per curiam*, 179 F.3d 956 (5th Cir. 1999); *cf.* Janson v. LegalZoom, 802 F. Supp. 2d 1053,

information-driven reading of the First Amendment because it facilitates the creation and dissemination of legal information yet preserves the market for disciplinary knowledge, because it conveys to the recipient that legal information does not substitute for legal expertise.

Geographic restrictions also compromise the free flow of legal information created and disseminated by lawyers. For example, an attorney who is expert in handling uncontested divorces licensed to practice in one state cannot do so in another if unlicensed. Geographic restrictions wholly foreclosing the practice of law in a jurisdiction where one is not admitted do not, in and of themselves, cultivate or preserve professional expertise. Rather, geographic restrictions should be more narrowly drawn to correlate with the need to ensure appropriate knowledge of state law and procedure where familiarity with these nuances is necessary to deliver competent legal advice and representation.

C. Advertising and Antisolicitation Rules

Constraints on advertising and solicitation are another area of lawyer regulation that deserves reevaluation in light of the Court's heightened protection for the creation and dissemination of information. Recall that a primary concern for the Court in *Bates v. State Bar* was "the right of the public as consumers and citizens to know about the activities of the legal profession."[138] The Court was at least as focused, if not more so, upon the public's informational interests as it was upon the attorneys' speech interests. Under both an information-driven and democratic competence–centered analysis, *Bates* was correctly decided, though this view is not necessarily uniformly shared.[139]

After the Court struck down the wholesale ban on attorney advertising in *Bates*, it then turned its attention to restrictions on in-person solicitation of clients. In 1978, the Court decided two cases involving lawyer solicitation of clients on the same day, one involving an ambulance chaser and the other involving a civil rights attorney. The Court drew a line between the two cases regarding speech that can be regulated under the First Amendment. In *Ohralik v. Ohio State Bar Ass'n*,[140] the Court determined that the state could ban an ambulance chaser from in-person solicitation of injured victims to inform them of their potential liability damages, but in *In re*

1063–65 (W.D. Mo. 2011) (holding that LegalZoom's legal document preparation service provided online constituted the unauthorized practice of law).

138. Bates v. State Bar, 433 U.S. 350, 358 (1977) (quoting *In re* Bates, 555 P.2d 640, 648 (Ariz. 1976) (Holohan, J., dissenting)).

139. Justice O'Connor, for example, has made it known that she believes Bates was *wrongly* decided. *See, e.g.*, Edenfield v. Fane, 507 U.S. 761, 778 (1993) (O'Connor, J., dissenting) ("I continue to believe that this Court took a wrong turn with *Bates v. State Bar of Arizona* . . . and that it has compounded this error by finding increasingly unprofessional forms of attorney advertising to be protected speech. . . . In my view, the States have the broader authority to prohibit commercial speech that, albeit not directly harmful to the listener, is inconsistent with the speaker's membership in a learned profession and therefore damaging to the profession and society at large.").

140. 436 U.S. 447 (1978).

Primus,[141] the Court held that a lawyer for the American Civil Liberties Union (ACLU) could not be banned from in-person solicitation of women who had been sterilized to inform them of their constitutional rights.[142] The Court endeavored to reconcile these decisions by looking to the fact that Ohralik was soliciting for his own financial gain, whereas the ACLU lawyer was offering services free of charge (though she still received a salary from the ACLU). Under an information-driven understanding of the First Amendment, Ohralik should have been permitted to provide the legal information, even at the hospital bedside. Whether this restriction upon solicitation holds up under principles of democratic competence is less clear, though a blanket restriction on attorneys from providing information about legal rights and entitlements in this way does not seem consistent with the preservation of disciplinary knowledge. Instead, regulation should address, in a targeted way, the underlying concern at issue in *Ohralik*, which was not in-person contact from an attorney but rather undue influence upon a vulnerable prospective client.

D. Economic Theory and the Legal Information Market

Economic theory supports this First Amendment analysis. For example, economist and law professor Gillian Hadfield has deployed economic tools to assess what she believes is wrong with the distribution of legal services and, importantly, how to fix it, by exploring why the law market is not competitive. She identifies three sources of the law monopoly as destroying competition: (1) "state prohibition of the practice of law by non-lawyers and limitations on the number of people admitted to law schools and the bar"; (2) "natural entry barriers to the practice of law—the increasing returns to human capital and scale, the limited opportunities to gain experience in procedures with decision makers, and natural limitations on the supply of individuals with the cognitive ability necessary to effectively engage in the complex reasoning of law and legal process"; and (3) "the state's monopoly on coercive dispute resolution—only dispute resolution through the public courts can force the other party to the table."[143] Her solution is not complete deregulation proposed by some,[144] but what she calls "right-regulation," i.e., regulation that

> would not only remove the barriers to the corporate practice of law and limits on the capacity for legal services to be provided by a much wider array of entities and individuals, [but] also expose suppliers of legal services to the consumer protection, professional negligence, antitrust, and other law that regulates ordinary markets.[145]

141. 436 U.S. 412, 437–40 (1978).
142. *Id.*
143. *Id.* at 983.
144. *See* CLIFFORD WINSTON ET AL., FIRST THING WE DO, LET'S DEREGULATE ALL THE LAWYERS 82–94 (2011).
145. Gillian Hadfield, *Right-Regulating Legal Markets*, TRUTH ON MARKET (Sept. 19, 2011), http://truthonthemarket.com/2011/09/19/gillian-hadfield-on-right-regulating-legal-markets/.

Over three decades ago, Geoff Hazard, Russ Pearce, and Jeff Stempel similarly critiqued regulators as having "failed to appreciate that legal services are a market commodity."[146] As they explained, "[O]pponents and supporters of advertising have not fully recognized that advertising, by enabling the dynamics of normal market forces to operate on the delivery of legal services, may alter methods of supplying, as well as delivering, legal services."[147] Their observations remain true today, and have even broader applicability than the authors might have originally contemplated, bearing on the nonlawyer ownership and investment ban, the prohibition on multidisciplinary partnerships, and geographic restrictions.[148]

CONCLUSION

The economic arguments for liberalizing lawyer regulation to facilitate the free flow of information support the First Amendment analysis. Perhaps one state will bravely implement a regulatory structure to expand access to legal information without intervention by the U.S. Supreme Court. If not, as this Article has shown, many of the restrictions governing the organizational form of law practice and the distribution of legal services are constitutionally vulnerable to the extent they constrain the creation and distribution of legal information by lawyers absent a justification that enables or preserves the essence of the lawyer-client relationship.

146. Hazard, Pearce & Stempel, *supra* note 18, at 1087 (applying "basic market and economic theory to the production and consumption of legal services and demonstrat[ing] that lawyer advertising offers important advantages to consumers of legal services").

147. *Id.* at 1093.

148. For further economic justifications supporting deregulation of the legal profession, see Benjamin Barton, *Why Do We Regulate Lawyers?: An Economic Analysis of the Justifications for Entry and Conduct Regulations*, 33 ARIZ. ST. L.J. 429, 445–46 (2001) ("A well-publicized lawyer-disciplinary agency that shared information about attorney competence or complaints with the public would likely alleviate most, if not all, information asymmetry problems."); *see also* CLIFFORD WINSTON ET AL., *supra* note 144; Adams & Matheson, *supra* note 111.